

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAVID A. BAZZLE</b>	)	
Claimant	)	
VS.	)	
	)	
<b>TNT DUGAN, INC.</b>	)	Docket No. 210,521
Respondent	)	
AND	)	
	)	
<b>INSURANCE CO. STATE OF PENNSYLVANIA</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge Steven J. Howard on February 6, 1998. The Appeals Board heard oral argument August 18, 1998.

**APPEARANCES**

Michael R. Wallace of Shawnee Mission, Kansas, appeared on behalf of claimant. Kenneth J. Hursh of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge awarded benefits for a 72.5 percent work disability based on a 45 percent loss of ability to perform tasks and a 100 percent wage loss. K.S.A. 44-510e. Respondent disputes the findings on both prongs of the work disability formula. According to respondent, the ALJ erred when he found a 45 percent task loss because he failed to consider claimant's regular hearing testimony describing the work tasks. Respondent contends that description differed materially from the description claimant

gave the vocational expert, Mr. Michael J. Dreiling, which Dr. Edward J. Prostic in turn relied on when he gave his opinion (the only opinion in the record) on task loss.

Respondent challenges the wage loss finding on the basis of the principles stated in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Specifically, respondent argues claimant did not make a good faith effort to find employment after his injury and a wage should be imputed to claimant in calculating the wage loss.

Claimant also asks the Board to address questions concerning claimant's average weekly wage. Claimant contends the ALJ erred when he did not add the value of fringe benefits to claimant's average weekly wage. Finally, claimant lists as an issue the constitutionality of K.S.A. 44-510e. Consistent with the Board's prior decisions, claimant asks that the issue be preserved for appeal but recognizes that the Board will not rule on the constitutionality of an act of the legislature.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments by the parties, the Appeals Board concludes that the Award should be modified to award benefits based on a 68 percent work disability.

#### **Findings of Fact**

1. Claimant was injured December 22, 1995, when he jumped off the back of a trailer. He felt a sharp pain in his lower back and pain radiating down both legs.
2. The initially-authorized treating physician referred claimant to Dr. Robert M. Drisko, II. Dr. Drisko performed back surgery consisting of decompression laminectomy and foraminotomies at L4-5 and L5-S1 bilaterally.
3. Dr. Drisko released claimant with restrictions in September 1996. The restrictions were to limit lifting to 20 pounds, pushing or pulling to 40 pounds, and to avoid repetitive bending and twisting.
4. Dr. Edward J. Prostic examined and evaluated claimant's injury first on March 14, 1996, and then again on December 2, 1996. From the examination of March 14, Dr. Prostic recommended surgery. After the surgery, Dr. Prostic rated claimant's functional impairment as 22 percent of the whole body. He recommended claimant limit lifting to 25 pounds occasionally and 10 pounds repetitively. He also recommended claimant avoid more than minimal bending or twisting at the waist, avoid forceful pushing/pulling, and avoid use of vibratory equipment.

5. After Dr. Drisko released claimant to return to work, claimant first tried to return to work for respondent. Respondent had no work available within claimant's restrictions. Claimant has since sought employment through listings with Missouri Job Service, through ads in the newspaper, and through referrals from friends and family. Claimant applied at approximately three employers per week but has been unable to find employment.

6. Respondent did not pay for any fringe benefits or pay any "additional compensation" as defined in K.S.A. 44-511 prior to the accident at issue here. The Board also finds claimant was a part-time employee and not entitled to fringe benefits at the time of the injury.

7. Based on testimony by Michael J. Dreiling, vocational rehabilitation consultant, the Board finds that claimant performed 11 tasks in his employment during the 15 years before the current accident.

8. The Board finds, based on testimony by Dr. Prostic, claimant cannot, because of the work restriction from the current injury, perform 4 of the 11 tasks identified by Mr. Dreiling. Although Dr. Prostic testified claimant could not perform 5 of the 11 tasks, Dr. Prostic relied on the task description by Mr. Dreiling. Mr. Dreiling used an incorrect description of Task No. 7. He thought it involved lifting greater weights than was in fact the case. Task No. 7 was the task of loading the tanker truck claimant drove for respondent. Mr. Dreiling understood this task to involve running a hose from a tank in the refinery to claimant's truck and would include lifting approximately 50 pounds of hose. But claimant testified this task involved swiveling a hose from a tank to a connector on his truck. He did not lift the hoses but moved them on a swivel. The Board therefore finds claimant has not proven he cannot now perform the task identified as Task No. 7 in Mr. Dreiling's report.

Respondent argues that, for the same reason, Task No. 8 should be eliminated from the list claimant cannot do. The Board disagrees with respondent's argument as to Task No. 8. Task No. 8 was the task of unloading the product to deliver it to customers. Mr. Dreiling understood this involved moving a 2-inch hose approximately 100-feet long. Claimant testified that sometimes he unloaded into in-ground tanks and sometimes into above-ground tanks. He connected two to three 10-foot sections. In some cases, he did have to haul these up a ladder to the top of a tank. Mr. Dreiling acknowledged that the description of Task No. 8 claimant gave at the regular hearing differed from the description Mr. Dreiling obtained. But in the end, he testified claimant's description at the regular hearing was consistent with his own understanding. The Board also notes claimant's description involved what appears to be significantly more physical activity than was involved in loading the tanker. Claimant had to haul the hoses up on top of tanks and had to bend and stoop to connect the hoses. The Board finds claimant has met his burden of proving Task No. 8 violated the medical restrictions.

As indicated, the Board, therefore, finds claimant cannot now perform 4 of the 11, or 36 percent, of the relevant tasks.

### Conclusions of Law

1. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

2. The actual wage loss is used only when claimant has made a good faith effort to find employment. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

3. The Board finds claimant did make a good faith effort to obtain employment after the injury he suffered working for respondent.

4. Claimant's wage loss, for purposes of calculating disability, is 100 percent.

5. The Board finds claimant has proven he can no longer perform 36 percent of the tasks he performed in the relevant 15-year history. K.S.A. 44-510e. As to Task No. 7 in the list prepared by Mr. Dreiling, the Board finds claimant has failed to meet his burden of proving claimant cannot perform that task.

6. Claimant has a 68 percent work disability. K.S.A. 44-510e.

7. Claimant is not entitled to have the value of fringe benefits, "additional compensation," added to his average weekly wage under K.S.A. 44-511 because claimant was not eligible for those benefits. The Board agrees with claimant's contention that if he were legally entitled to the benefits, they should be added even if they were not, in fact, paid. The "additional compensation" would be added just as straight wage would be counted if claimant was legally entitled to the wage but the employer failed or refused to pay. The Board concludes, however, claimant was not legally entitled to the benefits and those benefits should not be added.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Steven J. Howard on February 6, 1998, should be, and is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, David A. Bazzle, and against the respondent, TNT Dugan, Inc., and its insurance carrier, Insurance Company State of Pennsylvania, for an accidental injury which occurred December 22, 1995, and based upon an average weekly wage of \$465.36, for 59 weeks of temporary total disability compensation at the rate of \$310.26 per week or \$18,305.34, followed by 252.28 weeks at the rate of \$310.26 per week or \$78,272.39 for a 68% permanent partial disability, making a total award of \$96,577.73

As of September 18, 1998, there is due and owing claimant 59 weeks of temporary total disability compensation at the rate of \$310.26 per week or \$18,305.34, followed by 84 weeks of permanent partial disability compensation at the rate of \$310.26 per week in the sum of \$26,061.84, for a total of \$44,367.18 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$52,210.55 is to be paid for 168.28 weeks at the rate of \$310.26 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS  
Kenneth J. Hursh, Overland Park, KS  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director